Supreme Court, U.S.
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No. 05-897

IN THE

Supreme Court of the United States

THE NEW YORK TIMES COMPANY

Petitioner,

v.

STEPHEN J. HATFILL

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has instructed that the First Amendment limits defamation claims to the reasonable meanings of words in context, but has never defined how this standard applies when unstated defamatory implications are allegedly conveyed. Here, a divided panel of the court of appeals reinstated claims for libel and intentional infliction of emotional distress based on the allegation that opinion columns criticizing the FBI's unsuccessful investigation of the deadly anthrax mailings in 2001 *implicitly* accuse plaintiff of responsibility for those mailings, even though the columns explicitly and unambiguously disavow any such accusation.

1. Does the First Amendment limit the actionable defamatory implications arising from a publication about a matter of public concern to those that a recipient would reasonably conclude the publication, taken as a whole, was intended to convey?

2. Does the First Amendment preclude liability for the tort of intentional infliction of emotional distress based upon the alleged publication of a false and defamatory implication, when the challenged publication involves a matter of public concern and was not written for the specific purpose of inflicting harm on the plaintiff?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) and Rule 29.6 of the Rules of the Supreme Court of the United States, the following are parties to the proceeding below:

The New York Times Company, appellee below and petitioner here, is a publicly traded company and has no affiliates or subsidiaries that are publicly owned and no publicly held company owns more than 10% of its stock.

Steven J. Hatfill, appellant below and respondent here, is an individual.

Nicholas Kristof, an individual, was dismissed as a defendant in the case by the district court pursuant to a stipulated order, and he is not a party to this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The New York Times Company (the "Times") respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this action.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 416 F.3d 320, and is reprinted in the Appendix. App. 1a-32a. The decision of the United States Court of Appeals for the Fourth Circuit, denying rehearing or rehearing *en banc*, together with the opinion of Judge Wilkinson (joined by Judges Michael and King) dissenting from the denial of rehearing *en banc*, is reported at 427 F.3d 253, and is reprinted in the Appendix. App. 62a-74a. The opinion of the United States District Court for the Eastern District of Virginia is reported at 2004 WL 3023003, and is reprinted in the Appendix. App. 35a-61a.

JURISDICTION

The decision of a panel of the Court of Appeals for the Fourth Circuit was rendered on July 28, 2005. The Court of Appeals denied a petition for rehearing or rehearing *en banc* on October 18, 2005. This petition is timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the First Amendment to the United States Constitution, which provides in pertinent part: "Congress shall make no law . . . abridging freedom of speech, or of the press . . . ." U.S. Const., amend. I.

STATEMENT OF THE CASE

A. Background

In late 2001, the nation was terrorized when anthrax-laced envelopes were sent by mail to a number of public officials and prominent members of the news media. The mailings caused at least five deaths. App. 3a. The FBI thereafter launched what was publicly described as one of the largest and most important domestic terrorism investigations ever carried out by the federal government.[1] Almost a year later, in August 2002, Attorney General John Ashcroft publicly identified Dr. Steven Hatfill ("Hatfill") as a "person of interest" to the FBI's investigation. *Hatfill v. Ashcroft*, No. 03-1793 (D.D.C.), First Amended Complaint at ¶ 51 (filed Nov. 18, 2005).

Hatfill had been called to the attention of FBI investigators months earlier by scientists who identified him as one of a handful of microbiologists working in the United States who had the "ability, access and motive" to have carried out the mailings. The FBI took a number of steps to investigate Hatfill, which included subjecting him to a polygraph exam and conducting a very public search of his home in Maryland. *Id.* ¶ 32. These actions were widely reported in the press before the Attorney General identified Hatfill as a specific "person of interest." *Id.* ¶ 51. Hatfill has never been charged with the crime, nor has anyone else.

Between May and August 2002, Nicholas Kristof wrote a number of Op-Ed columns in *The New York Times* addressing the status of the anthrax investigation. He maintained that the success of this investigation was vital to national security, criticized the FBI's "inept" and "lackadaisical" handling of the investigation, and questioned

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[1] *See, e.g.*, Tania Valdemoro, *Lawsuits Could Shed Light on Anthrax Probe*, Palm Beach Post, May 14, 2005, at C1.

the adequacy of security at government bio-defense research facilities. App. 90a-106a. The columns made plain the author's view that FBI missteps were making the nation significantly more vulnerable to a potential bio-terrorism attack.

Kristof used what he believed to be the inadequate effort to investigate Hatfill as one example of what he perceived as the FBI's many failings. Because Kristof's point was not to assign guilt or innocence to Hatfill, but rather to call attention to what he believed was grossly deficient performance by the government, the initial columns did not name him. They referred instead to an unnamed "Mr. Z," a scientist being investigated in a slip-shod manner that typified the entire anthrax investigation as far as Kristof was concerned. One column, for example, posed a series of questions about Mr. Z that the FBI could not answer and had failed to investigate for nearly six months. App. 95a-96a. Kristof explained that his purpose was to "light a fire under the FBI" in order to "reduce our vulnerability to another attack." App. 92a.

While invoking the investigation of Hatfill to dramatize a larger issue, the columns also took care to caution readers *against* drawing any conclusion of Hatfill's guilt. Among other things, the columns noted that:

- Hatfill "denies any wrongdoing," and "denies any involvement," App. 95a, 98a;
- His "friends are heartsick at suspicions directed against a man they regard as a patriot," App. 95a;
- The FBI should either "go after him more aggressively" or "exculpate him," *id.*;
- "It must be a genuine assumption that [Hatfill] is an innocent man caught in a nightmare," App. 104a; and